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against the objections of the landowner the trespasser becomes bound to pay the value of the improvements in subsequent condemnation proceedings.[5] The distinction has not been followed elsewhere and is expressly disapproved in the principal case. The Supreme Court of California also has indicated its willingness to overrule United States v. Land in Monterey County in so far as it conflicts with the prevailing doctrine.[6] Since the landowner can recover full damages for the trespass, there seems to be no reason for the distinction, as it amounts practically to a forfeiture of the property by way of punitive damages.

The rule of the principal case appears to involve an extension of the doctrine of trade fixtures to cases where there is neither a landlord and tenant relationship nor any agreement between the parties. While it is difficult to find the exact grounds on which to justify the doctrine, it is one which is entirely fair to the parties and is a sensible way of disposing of the matter. The landowner has expended nothing on the fixtures, they are usually useless to him until severed and they were not intended for use in connection with the land. The trespasser desires only an easement over the land, and intended the improvements to be dedicated to use in connection with such easement and as part of an extended plant. He has also the power to obtain the property by taking the proper proceedings. In so far as his failure to do so before entry on the land has injured the landowner, the latter can recover in ejectment, trespass or an action for the use and occupation of the land.[7] As the landowner is entitled only to "just compensation" in condemnation proceedings, why should the public utility be forced to pay twice for the property which it has prematurely affixed to the land?

A closer question is presented when the improvements affixed by the trespasser are, as in the case of a shed or warehouse, capable of use in connection with the land itself, independently of any easement. In such a case it would appear that they were intended for use in connection with the land, rather than with the easement of way, and that they become "fixtures" in the strict sense, and, therefore, that the landowner is entitled to be paid their value in the condemnation proceedings.

J. S. M., Jr.

EVIDENCE: CONFIDENTIAL COMMUNICATIONS: ATTORNEY AND CLIENT.—That an attorney cannot without the consent of his client be examined as to any communications made by the client to him in the course of professional employment is a privilege that has been strongly denounced.[1] In favor of the privilege it

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[5] United States v. Land in Monterey Co. (1874), 47 Cal. 515.
[6] Albion River R. R. Co. v. Hesser (1890), 84 Cal. 435, 24 Pac. 288.
[7] Justice v. Nesquehoning Valley R. R. Co. (1878), 87 Pa. St. 28.
[1] Appleton on Rules of Evidence, ch. X., following Bentham.

has been pointed out that in few cases is the right all on one side. Consequently it would be unfair to permit an opponent to draw out the damaging statements that a client has made to his attorney, since there would be no opportunity to present the statements in the client's own favor. A denial of the privilege would give an advantage to unscrupulous attorneys who would conceal their client's damaging statements and would lead clients to lie to their attorneys by telling only the favorable side of their cases, thus making it impossible to ascertain their legal rights and to arrive at an adjustment without litigation. These practical considerations have resulted in the perpetuation of the privilege[2] and this policy is unquestioned in the case of *Ex parte McDonough*,[3] the dissenting opinion denying the application of the privilege to the facts of the particular case. These facts are briefly, that one Higgins was arrested for alleged frauds against the election laws. Wooley and Gorman were suspected in connection with these frauds. McDonough, an attorney, was retained by Wooley and Gorman to represent them. Some one engaged him to represent Higgins. The attorney declined to inform the grand jury in its investigation of these election frauds, whether Wooley and Gorman had employed him to represent Higgins, or who had so employed him.

Ordinarily the identity of the client is not a privileged matter. No one can employ an attorney to conduct litigation for him and by concealing his own identity thereby escape the consequences for costs, damages, malicious prosecution, etc. Obviously, however, this reasoning does not apply in the case of a defendant in a criminal proceeding. He is, as a matter of right, entitled to counsel. The court would assign him counsel if no one else appeared. It is therefore entirely immaterial who procures or pays the attorney for the defense in a criminal case. The only purpose of the questions, and none other is suggested, must have been to ascertain the identity of the accomplices of the man arrested and obtain an admission against them. Surely, however, one may consult an attorney with reference to an alleged criminal act without surrendering himself to the authorities. It would hardly be contended that a list of suspects could be obtained by the grand jury inquiring of all the attorneys in the community as to who had consulted them in the matter. The situation is not changed by the fact that one of the alleged participants has been arrested. It is urged in the dissenting opinion that to permit an undisclosed accomplice to furnish counsel for those apprehended tends to prevent the state from getting those arrested to turn state's evidence.

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[2] Wigmore on Evidence, § 2291; Cal. Code Civ. Proc. § 1881; French Code Penal, § 378.

[3] (May 24, 1915), 49 Cal. Dec. 711, 717, 149 Pac. 566.

This consideration is offset by the possibility of those apprehended falsely accusing alleged accomplices, a danger against which suspects have a right to guard themselves. The majority opinion would thus seem sound in not denying the privilege on the mere rule of thumb that the identity of the client is not a privileged matter, but in looking into the facts of the case to see whether it comes within the principle upon which the privilege is based.

A. M. K.

EVIDENCE: HEARSAY RULE: USE OF IN PROCEEDINGS BEFORE THE INDUSTRIAL ACCIDENT COMMISSION.—Is the hearsay rule a mere technical rule of evidence? *Englebretson v. Industrial Accident Commission* and *Employers Assurance Corporation Limited v. Industrial Accident Commission*[1] say it is not. This decision seems at first glance perfectly natural, for the hearsay rule has been described as "that most characteristic rule of the Anglo-American law of evidence,—a rule which may be esteemed next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure."[2] Yet the decision of the court is open to question. The hearsay rule had its origin in the jury system. As understood in the English common law it plays no part in continental systems, nor is it of so much importance in England except in jury trials.[3] As Sir Henry Maine remarked, "The English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure."[4] It is one of the curious examples of the formalism of American law that the peculiar English rules of evidence devised for the guidance of the untrained jury should be solemnly applied by courts and other expert tribunals sitting without a jury. The principal cases are, indeed, an example of this formalism, for the decisions rest on the fact that there is no case in point sustaining the ruling of the commission; the search is for a precedent, without a consideration of the theory and history of the rule. The hearsay rule has been referred to by Chamberlayne as standing forth "the Gibraltar of procedure in the midst of more liberalizing tendencies."[5] It is further characterized by the author "as an anomaly in the law of evidence," and the one case where it has been "thought wise to decline attempting to do justice, because the attempt may fail."[6]

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[1] (Cal., Aug. 7, 1915), 50 Cal. Dec. 241, 50 Cal. Dec. 239.
[2] Wigmore on Evidence, § 1364.
[3] Chamberlayne, The Modern Law of Evidence, § 2720; 3 Cal. Law Rev. 187.
[4] Quoted in Thayer, Preliminary Treatise on Evidence, p. 508.
[5] Chamberlayne, vol. 4, p. vi.
[6] Chamberlayne, §§ 2577, 2719.